

1                               BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2   STATE OF WASHINGTON

3	ALLIED AQUATICS, INC.,	)	
4		)	
5	Appellant,	)	PCHB Nos. 89-16,
6		)	89-17 and 89-118
7	v.	)	
8		)	
9	STATE OF WASHINGTON, DEPARTMENT	)	FINAL FINDINGS OF FACT,
10	OF ECOLOGY,	)	CONCLUSIONS OF LAW
11		)	and ORDER
12	Respondent.	)	

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13           This matter, the appeal of four civil penalties (aggregating  
14 \$7,500) for alleged violation of conditions imposed on the application  
15 of aquatic herbicides in Lake Washington, came on for hearing on  
16 November 20, and December 1, 1989 in Lacey, Washington, before the  
17 Pollution Control Hearings Board: Wick Dufford, Presiding, Judith A.  
18 Bendor, Chair, and Harold S. Zimmerman, Member.

          Appellant Allied Aquatics, Inc., was represented by its  
President, Douglas Dorling. Respondent Department of Ecology was  
represented by Charles W. Lean, Senior Assistant Attorney General.

1 The proceedings were reported by Janet Neer of Robert H. Lewis and  
2 Associates (day one) and Bibi Carter of Gene Barker and Associates  
3 (day two).

4 Witnesses were sworn and testified. Exhibits were admitted and  
5 examined. From the testimony and exhibits, the Board makes the  
6 following:

7 FINDINGS OF FACT

8 I

9 Allied Aquatics, Incorporated, is a company in the business of  
10 applying herbicides in waters of the state to control the growth of  
11 plants considered undesirable by waterfront property owners.

12 II

13 The Department of Ecology conducts a regulatory program for  
14 aquatic herbicide use which requires that each application project be  
15 authorized in advance before it can proceed. The mechanism used in  
16 each case is an administrative order which, on a short-term basis,  
17 modifies water quality standards for the location where herbicides are  
18 applied. These orders set forth the timeframe, general location, and  
19 type of chemicals to be used. In addition, they list detailed  
20 conditions which the applicator must follow in carrying out any  
21 project.

22 III

23 On June 27, 1988, two of these orders were issued to Allied  
24

1 Aquatics allowing the application of herbicides at two different  
2 locations in Lake Washington, during a timeframe specified as June 15  
3 through October 1.

4 Order DE 88-266 referred to "Treatment of 25 acres of milfoil and  
5 pondweeds in and adjacent to Newport Shores in Lake Washington."

6 Order DE 88-267 referred to "Treatment of 20 acres of milfoil and  
7 lily pads on the east shore of Fairweather Bay and west shore of Cozy  
8 Cove in Lake Washington."

9 The following conditions in these two orders were identical:

10 S-4 Use of Aquathol K requires the written consent of  
11 any holders of recorded water rights for irrigation  
12 and domestic use within 40 feet of the area of  
13 application. This consent must acknowledge the  
14 chemical being used and applicable water use  
restrictions and must be kept on record by the  
applicant with a copy provided to the Washington  
Department of Ecology Enforcement Officer.

15 G-4 Where the majority of the lake is to be treated,  
16 inform all residents around the lake of the proposed  
17 treatment including product, approximate time to be  
18 treated and any use restrictions. When smaller  
19 areas are to be treated, inform residents of all  
20 shoreline property within 400 feet of the area to be  
21 treated by personal notification mail or hand  
22 bills. Notification will be given one week prior to  
23 treatments. For copper compounds notification will  
24 be given prior to treatment.

25 G-5 Public access, resort and public boat launch areas  
26 will be posted with a sign constructed of plywood  
27 (not less than three feet square) explaining water  
use restrictions.

G-7 Normally, treated areas will comprise a very small  
percentage of the lake at any one time. Treated  
areas will be marked from both the shoreline and  
water, so that fishermen and others are aware of the

26 FINAL FINDINGS OF FACT,

27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 89-16, 89-17 & 89-118

(3)

1 restrictions. Marker buoys shall identify the  
2 treated area. All buoys or other markers shall  
3 state any use restrictions and shall also state that  
such restrictions apply within the buoyed area and  
400 feet surrounding that buoyed area.

4 G-8 Ensure that the posting and notification process  
5 includes all persons who may reasonably withdraw  
water in the treatment or drift area.

6 G-13 The applicator will assure that the application of  
7 herbicides to the target area will not affect crops  
or deny use of water for irrigation.

#### 8 IV

9  
10 The Newport Shores herbicide treatment took place on June 27,  
11 1988. The Fairweather Bay and Cozy Cove project was undertaken on  
12 July 6, 1988.

13 On July 13, 1988, Ecology sent separate Notices of Violation to  
14 Allied Aquatics asserting violations at each locale of conditions  
15 specified in the relevant water quality modification order.

16 Subsequently, on December 29, 1988, notices of penalty were sent  
17 regarding the asserted violations. These notices were each amended on  
18 March 30, 1989.

19 In final form, Notice of Penalty Incurred and Due No. DE 88-371  
20 assessed a \$3,000 fine for the alleged violation of Conditions G-4,  
21 G-5, G-8 and G-13 during operations at Newport Shores.

22 In final form, Notice of Penalty Incurred and Due No. DE 88-372  
23 assessed another \$3,000 fine for the alleged violation of Conditions

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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
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1 S-4, G-4, G-7, G-8 and G-13 during operations at Fairweather Bay and  
2 Cozy Cove.

3 Allied Aquatics appealed. The appeals were assigned our cause  
4 numbers PCHB No. 89-16 (Newport Shores) and 89-17 (Fairweather Bay and  
5 Cozy Cove) and consolidated for hearing.

6 V

7 NEWPORT SHORES

8 The notification process for the Newport Shores project was  
9 rendered complex by Ecology's delay in issuing the Order allowing the  
10 operation.

11 Allied Aquatics sought permission for the project months before  
12 the 1988 growing season for aquatic plants. The company expected the  
13 Order to be issued in May. When this did not occur, communications  
14 with the agency led the company to believe the Order would be  
15 forthcoming by June 15. Just prior to that date, it became apparent  
16 that there would be a further delay. Ultimately the Order was issued  
17 on June 27.

18 VI

19 Allied originally scheduled the Newport Shores treatment for  
20 early June. Both the company and property owners' association which  
21 had contracted for the work attempted to provide advance notice of the  
22 project.

23 Many residents of the Newport Shores neighborhood are also  
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25  
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1 members of the private Newport Shores Yacht Club. The property  
2 owners' association' arranged for a preliminary notice about the  
3 herbicide treatment to be published in the Yacht Club's newsletter in  
4 May. The notice announced that the operation would take place "during  
5 the first half of June" and advised that more specific information  
6 would be provided to each household at a time closer to the date of  
7 treatment.

8 In early May, Allied placed a separate notice in the mailboxes of  
9 the neighborhood residences advising that the treatment was slated for  
10 the week of June 13. This notice said that specific information on  
11 water use restrictions would be posted on the day of treatment.

12 On June 8, the property owners generated a notice, hand-delivered  
13 to Newport Shores households, announcing that the chemical treatment  
14 would occur on June 16, and advising of the following specific water  
15 use restrictions: no swimming for 24 hours, no fishing for three  
16 days, no use of lake water for irrigation for seven days.

17 The timeframe dealt with in these early notices passed without  
18 Ecology's having issued an Order authorizing the project.

## 19 VII

20 On June 19 another notice was delivered to the neighborhood  
21 residences by the property owners' association. This was identical to  
22 the notice of June 8 except that the date of the treatment was changed  
23 to the date treatment actually did occur--June 27.

1 On the morning of June 27 before the treatment began, Allied  
2 again hand-delivered to the households notices advising of the  
3 operation and specifying the water use restrictions.

#### 4 VIII

5 We find that the hand delivery of notices to the Newport Shores  
6 neighborhood (103 households) included all persons who might  
7 reasonably be anticipated to withdraw water in the treatment or drift  
8 area.

9 However, we believe that the notices given respecting early dates  
10 when treatment did not in fact occur diluted the effectiveness of the  
11 notices later given about the correct date. Some persons may not have  
12 taken note of the correct notices. It is likely that some assumed the  
13 water was treated in the week of June 13 and by June 27 thought the  
14 water was perfectly safe to use.

#### 15 IX

16 On the morning the herbicide treatment was performed, Allied  
17 placed a three by five foot fluorescent sign at the entrance to the  
18 Newport Shores residential area advising of the operations that day.  
19 But, no signs were placed at the Newport Yacht Club explaining water  
20 use restrictions. We find that the Yacht Club is neither a public  
21 access, nor a resort nor a public boat launch area.

#### 22 X

23 We are not convinced that the herbicide application in waters  
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1 adjacent to Newport Shores directly or indirectly caused any damage to  
2 crops or to lawns, shrubs or flower gardens in the Newport Shores  
3 residential area.

4 However, we find it more likely than not, that the early  
5 notification of water use restrictions for a timeframe prior to the  
6 actual date of treatment, resulted in the non-use of lake water by  
7 some persons during a period when no restrictions were called for,  
8 effectively denying the use of water for irrigation.

#### 9 XI

#### 10 FAIRWEATHER BAY AND COZY COVE

11 Ecology's concerns for advance notice of the Fairweather Bay and  
12 Cozy Cove project relate to households along 80th Avenue North East.  
13 We find that none of these households is within 400 feet of the  
14 treatment area involved.

15 Further, we find that there are no holders of recorded water  
16 rights for irrigations or domestic use within 400 feet of the area of  
17 application.

#### 18 XII

19 On the record before us, we are not persuaded that Allied failed  
20 to ensure that the posting and notification process for Fairweather  
21 Bay and Cozy Cove included all persons who might reasonably withdraw  
22 water in the treatment and drift area. In addition we have no  
23 evidence that Allied's application of herbicides at these sites either  
24 affected any crops or denied the use of water for irrigation.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
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XIII

Fairweather Bay and Cozy Cove are on opposite sides of Hunt's Point which juts into Lake Washington north of Bellevue. The herbicide treatment for these two sites took most of the day of July 6, 1987.

However, it was not until the treatment had been completed and, then, only at the verbal order of an Ecology inspector, that Allied deployed marker buoys around the treated areas. The buoys were not even ready for deployment when Allied began to apply the herbicide. After the DOE's verbal order, Allied had to spend additional time getting the buoys ready.

XIV

MEYDENBAUER BAY

In 1989, Ecology modified its herbicide regulation program, setting up a two-step Order scheme. The agency designed a General Order (No. DE 89-000) which it issued to herbicide applicators who requested temporary water quality modifications. This General Order set forth seven pages of detailed conditions applicable to every treatment project during the 1989 season. A separate special Order was issued for each specific project authorized, describing the project, listing conditions particular to it, and incorporating the provisions of the General Order.

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XV

On May 20, 1989, Ecology issued both the General Order and special Order No. DE 89-066 to Allied Aquatics, authorizing a proposal to apply herbicides in Meydenbauer Bay on Lake Washington in a treatment area "not to exceed 10 acres for pond weeds." The time frame specified was April 1 through October 1, 1989.

XVI

General Order No. DE 89-000 included, among others, the following conditions:

P-1 Any person who owns, rents, or may reasonably be expected to occupy dwellings within a 1/4 mile radius and within 500 feet shoreward of the areas to be treated shall be notified of:

- (1) the herbicide(s) to be used and their active ingredient(s),
- (2) approximate date(s) of treatment,
- (3) any water use restrictions,
- (4) the posting procedure, and
- (5) the names and phone numbers of the applicator and the Department of Ecology so they can acquire more information.

The 1/4 mile zone of notification is for all herbicides used unless a greater distance is specified under the label restrictions. (For example, Rodeo is not to be applied within 1/2 mile upstream of potable water intakes. In this case, the applicator shall notify all persons within 1/2 mile radius and 500 feet shoreward of the treatment area.)

Notification may be done either by registered mail or by hand bills given directly to the residents. If registered mail is used, the applicator shall send a list of the addresses where notices were sent to the Department of Ecology within one calendar day following mailing them. If hand bills are used, the applicator shall secure the notices to the residents's doorknob in a fashion that will hold them

1 in place but will not damage property. The  
2 applicator shall send the Department of Ecology a  
3 list of the addresses where handbills were delivered  
within one calendar day following delivery.

4 Notices shall be provided at least two times prior to  
5 the initial application of herbicides. The first  
6 notification shall take place at least 30 days prior  
7 to application, and the second notification shall  
8 take place 7 to 10 calendar days prior to  
9 application. If there is less than 30 days between  
10 the date of issuance of this control order and the  
11 date planned for initial treatment, only the 7 to 10  
12 day prior notice will be required. If the 7 to 10  
day notice explains the application schedule for the  
whole season, and there is no deviation from that  
plan, no further personal notice will be required for  
the rest of the season (unless a resident  
specifically requests further notification). If the  
date of treatment(s) change by over 14 calendar days  
or the location(s) to be treated change by over 100  
feet, the 7 to 10 day notification process shall be  
repeated . . .

13 P.4 Signs will be constructed and posted according to the  
14 following:

- 15 (1) Posting on the Shore: Signs on the land shall be  
16 made of durable weather resistant material. The sign  
17 dimensions shall be at least 8 1/2 inches high by 11  
18 inches wide. The lettering shall be in bold type.  
19 The work warning shall be printed in red and at least  
20 1 inch high. All other wording shall be printed in  
21 black and at least 1/4 inch high. The sign board  
22 shall be either white or yellow. These signs must be  
23 readable from both sides and be placed at all public  
24 access points to the waterbody and near the shoreline  
25 of every property owner within the zone of  
26 notification discussed in P.1. Obtain private  
27 property owner permission before placing signs on  
their premises. Signs shall be posted so that they  
are secure from the normal effects of weather and  
water currents, but cause no damage to private or  
public property. . . .

1 (2) Posting on the Water. Buoys shall be used to mark  
2 treatment area boundaries on the water. Weather  
3 resistant signs are to be attached to a buoy. Signs  
4 shall have wording on both sides. The size of the  
5 signs must be at least 8 1/2 inches high and 11  
6 inches wide. The lettering shall be at least 1 inch  
7 high for the word warning and at least a 1/4 of an  
8 inch for all additional information. The lettering  
shall be in bold type. The word warning shall be red  
and all other words shall be in black. The signboard  
shall be white or yellow. The buoy shall be of a  
type that will not be easily damaged from chance  
collisions with boats. The buoys should be spaced so  
there is one at each "corner" and additionally every  
200 feet around the treatment area. . . .

9 C-1 Herbicides containing label restrictions for  
10 domestic, livestock, and irrigation use shall only be  
11 used when all people who hold water rights and have  
12 filed water claims to withdraw surface water within a  
400 foot radius of the area to be treated have given  
their written permission. This consent must  
acknowledge the herbicide(s) being used, the date(s)  
of expected treatment, and all water use  
restrictions. . . .

## 14 XVII

15  
16 On August 16, 1989, Ecology sent a notice of penalty (No.  
17 DE 89-183) to Allied Aquatics, imposing a \$500 fine for the alleged  
18 violation of Conditions P-1 and C-1 on July 17, in Meydenbauer Bay.

19 Two days later, August 18, 1989, Ecology sent a separate notice  
20 of penalty (No. DE 89-184), to Allied, assessing a fine of \$1,000 for  
21 the alleged violation of Conditions P-1, P-4(1) and P-4(2) on July 31,  
22 in Meydenbauer Bay.

23 Allied Aquatics appealed. The appeals are combined under our  
24 cause number PCHB 89-118.

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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
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(12)

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2 XVIII

3 Meydenbauer Bay is a small embayment on the east side of Lake  
4 Washington within the City of Bellevue. Its inner reaches are narrow,  
5 confined and crowded. Private residences and condominiums abut the  
6 shore. In the midst of this residential pattern are three private  
7 boat moorage facilities, adjacent to one another. Within a quarter of  
8 a mile to the north of these is a public park with a much-used public  
9 swimming beach.

10 XIX

11 In 1989 Allied Aquatics contracted to apply herbicides at the  
12 most southerly of the moorages, the Meydenbauer Yacht Club.  
13 Immediately to the south of the yacht club is a condominium building  
14 at 101 101st Avenue South East.

15 The Meydenbauer Yacht Club project was carried out on July 17,  
16 1989. Advance notice of this operation was provided to the occupants  
17 of the condominium units by a posting on the building's reader  
18 board. Such notice was not provided individually to each person  
19 owning a condominium unit.

20 Moreover, we find that Allied did not send to Ecology a list of  
21 the addresses which received such notices.

22 XX

23 At the Meydenbauer Yacht Club, Allied reduced its area of  
24 application to eliminate any treatment south of the southernmost  
25

1 mooring pier. The effect was to distance the actual project area  
2 further from the condominium building on the adjacent property. We  
3 are persuaded that the area treated was more than 400 feet from the  
4 intake for lakewater for which the condominium property holds a water  
5 right.

6 XXI

7 Allied conducted a subsequent herbicide operation in Meydenbauer  
8 Bay on July 31, 1989. This involved the Bellevue Yacht Basin, the  
9 next moorage north from the Meydenbauer Yacht Club.

10 Relative to this project, there is evidence of residences being  
11 notified by the posting of notices on trees and telephone poles.  
12 However, again, we are unconvinced that advance notice was  
13 individually given to all persons who own, rent or might reasonably be  
14 expected to occupy dwellings within 500 shoreward of the area to be  
15 treated.

16 As before, we find that Allied did not send to Ecology a list of  
17 the addresses which received advance notice.

18 XXII

19 Warning signs detailing water restrictions were posted at various  
20 locations around Meydenbauer Bay on July 31. This posting included a  
21 number of signs at the beach and swimming area in the park north of  
22 the mmoorages, as well as on deep water pilings nearby.

23 Furthermore, park department personnel were alerted days in  
24

1 advance, and lifeguards on duty were advised by Allied on the 31st  
2 when the treatment would start. The swimming area was closed prior to  
3 commencement of the treatment and the lifeguards remained on duty to  
4 enforce the closure.

5 XXIII

6 Also on July 31, notices detailing water restrictions were posted  
7 at the waterside entrance to the Bellevue Yacht Basin on the lakeward  
8 ends of the facility's docks, and on adjacent pilings. No buoys with  
9 warning signs were placed in the channel outboard of the facility, but  
10 the herbicide treatment was entirely confined to the area with the  
11 docks.

12 XXIV

13 Ecology's enforcement files disclose the payment by Allied  
14 Aquatics of civil penalties for two prior violations: 1983, Hicks  
15 Lake, applying herbicides without prior permission (\$250) and 1984,  
16 Summit Lake, applying herbicides without prior permission (\$5,000).

17 XXV

18 Any Conclusion of Law which is deemed a Finding of Fact is  
19 hereby adopted as such.

20 From the foregoing Findings of Fact the Board enters the following  
21

22 CONCLUSIONS OF LAW

23 I

24 The Board has jurisdiction over the parties and the subject  
25 matter. Chapters. 90.48 and 43.21B RCW.

26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
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II

RCW 90.48.144 'authorizes the assessment of a civil penalty against any person who violates the state's water pollution control statute or any regulations or orders issued pursuant thereto. The penalty may be "in an amount of up to ten thousand dollars a day for every violation." The amount of penalty is to be set in consideration of the previous history of the violator and the severity of the violations' impact on public health and/or the environment in addition to other relevant factors.

In prior cases, the Board has considered the likely effect of the penalty on influencing corrective behavior as among the "other relevant factors." E.g., Georgia Pacific v. DOE, PCHB 87-82 (1988).

III

The state's water quality standards are set forth in Chapter 173-201 WAC. These standards are subject to short term modification in accordance with criteria established by WAC 173-201-035(8)(e). This subsection is specifically addressed to the aquatic application of herbicides and makes any such operation contingent on the giving of proper notice.

The Orders involved in the instant proceedings were all issued pursuant to WAC 173-201-035(8)(e).

IV

As to the operation at Newport Shores on June 27, 1988, we



1 conclude that Allied Aquatics violated Condition G-13 of Order  
2 DE 88-266, in that 'the premature notice of water use restrictions  
3 effectively denied the use of irrigation water to those entitled to  
4 use it.

5 Moreover, we believe that the pattern of notice giving, involving  
6 both false alarms and accurate notice, violated the intent of  
7 Condition G-4. That condition called for notification one week prior  
8 to treatment. Where, as here, correct and incorrect notices are made  
9 regarding the timing of events, the effect may be more to confuse than  
10 to enlighten the public involved.

11 V

12 We conclude that Conditions G-5 (posting of public access), G-8  
13 (notice to all who may withdraw water), and G-13, insofar as it deals  
14 with damage to crops, were not violated by the treatment at Newport  
15 Shores.

16 VI

17 Concerning the events at Fair Weather Bay and Cozy Cove on  
18 July 6, 1988, we conclude that Allied Aquatics violated Condition G-7  
19 of Order DE 88-267. An obvious and reasonable construction of the  
20 requirement for marker buoys is that they are to be deployed before  
21 the areas are treated with herbicide. Here the buoys were not put out  
22 until the event they warned of had been completed for several hours in  
23 some locales.

VII

We conclude that Conditions S-4 (consent of water rights holders), G-4 (general notice), G-8 (notice to all who may withdraw water) and G-13 (affect on crops, denying use of water) were not violated by the project at Fairweather Bay and Cozy Cove.

VIII

In relation to the treatment at the Meydenbauer Yacht Club on July 17, 1989, we conclude that Allied Aquatics violated Condition P-1 of General Order DE 89-000. The notice provided to residents of the next door condominium building was inadequate.

IX

We conclude that Condition C-1 (consent of water rights holder) was not violated by the Meydenbauer Yacht Club operation.

X

As to the project at the Bellevue Yacht Basin on July 31, 1989, we conclude that Allied Aquatics violated Condition P-1 of General Order DE 89-000. We are not persuaded that individual residents were timely notified by registered mail or hand bills given directly to them.

XI

We conclude that Conditions P-4(1) (posting on shore), and P-4(2) (posting on water) were not violated by the Bellevue Yacht Basin operation.

1 We note that Condition P-4(2) incorporates the marker buoy  
2 requirement. The explicit purpose of the requirement is to "mark  
3 treatment area boundaries on the water." Here, the entire treatment  
4 area was between existing docks. The objective of the Condition was  
5 satisfied by putting signs on the ends of the docks. Putting buoys in  
6 the channel with signs attached would have impeded navigation in  
7 already congested waters without advantage in fulfilling the ends  
8 sought to be achieved.

## 9 XII

10 Having sustained at least one violation under each of the notices  
11 of civil penalty, we turn to the matter of the amount of penalty in  
12 each case.

13 In so doing, we have been mindful that the principal aim of civil  
14 penalties is to change behavior--to deter future violations, both of  
15 the perpetrator and of the public generally. See, Cosden Oil v. DOE,  
16 PCHB 85-111 (1986).

17 The instant record discloses an evolving regulatory program in  
18 which both the implementing agency and the regulated applicators are  
19 growing increasingly more sophisticated. Requirements have become  
20 progressively more detailed and more numerous. Allied Aquatics has  
21 not been altogether successful in keeping pace with the changes. But  
22 under these circumstances, we do not believe the prior penalties paid  
23 for different violations several years ago should be given weight in  
24

1 the instant cases. Further, we have been pointed to no negative  
2 impacts "on public health and/or the environment" from the violations  
3 found here.

#### 4 XIII

5 Based on the record here, we conclude that the following  
6 penalties are appropriate:

7 1) Newport Shores - Reduce to \$500 from \$3,000. The problem in  
8 this case was too many, rather than too few notices. Ecology made the  
9 practical situation very difficult by delaying so long in issuing its  
10 authorizing Order. Nonetheless, Allied should not have issued notices  
11 without knowing for sure when the work would be performed. The new  
12 two-step Order system adopted in 1989 would appear to make repetition  
13 of this kind of problem unlikely.

14 2) Fairweather Bay and Cozy Cove - Sustain \$3,000, suspend  
15 \$1,000 on condition no violations of posting requirements for one  
16 year. The failure to place buoys in advance of treatment was a  
17 serious violation for which no satisfactory explanation was made.  
18 Effectively warning the public of water use restrictions is critically  
19 dependent on the timeliness of the notice. Here the water-borne  
20 public had no warning until hours after the application.

21 3) Meydenbauer Yacht Club - Sustain \$500. In 1989 Ecology  
22 added significant new detail to its general notice requirement,  
23 involving additional record keeping and reporting by applicators.

1 While the extra burden is recognized, Allied had sufficient time to  
2 comply between the issuance of the General Order on May 20 and the  
3 treatment date of July 17.

4 4) Bellevue Yacht Basin - Reduce to \$500 from \$1,000. Here the  
5 violation sustained is for the same sort of shortcoming which occurred  
6 in relation to the Meydenbauer Yacht Club two weeks earlier. The  
7 penalty was assessed two days after the Meydenbauer Yacht Club  
8 penalty; both were assessed in August after all the events in  
9 question. Under such circumstances a progressive increase in penalty  
10 could serve no remedial purpose.

#### 11 XIV

12 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
13 adopted as such.

14 From these Conclusions of Law, the Board enters the following  
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ORDER

1. Order DE 88-371 (Newport Shores) - reversed as to Conditions G-5 and G-8. Affirmed as to Conditions G-4 and G-13. Penalty - \$500.

2. Order DE 88-372 (Fairweather Bay and Cozy Cove) - reversed as to Conditions S-4, G-4, G-8 and G-13. Affirmed as to Condition G-7. Penalty - \$3,000, of which \$1,000 is suspended on condition that Allied Aquatics commit no violations of posting requirements for one year from the date of entry of this Order.

3. Order DE 89-183 (Maydenbauer Yacht Club) - reversed as to Condition C-1. Affirmed as to Condition P-1. Penalty - \$500.

4. Order DE 89-184 (Bellevue Yacht Basin) - reversed as to Conditions P-4(1) and P-4(2). Affirmed as to Condition P-1. Penalty - \$500.

DONE this 6<sup>th</sup> day of March, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Chair

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

DANIEL B. O'CONNELL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

PCHB No. 89-124

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of \$150 in civil penalties, for alleged violation of regulations implementing the water well construction law came on for hearing in Wenatchee, Washington, on March 9, 1990, before Wick Dufford, Presiding for the Board. Judith A. Bendor, Chair, and Harold S. Zimmerman, have reviewed the record.

Daniel B. O'Connell represented himself. The Department of Ecology was represented by P. Thomas McDonald, Assistant Attorney General. The proceedings were reported by Cindy J. Chatterton of Affiliated Court Reporters.

1           Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. From the testimony heard and exhibits examined, the Board  
3 enters the following:

4                               FINDINGS OF FACT

5                               I

6           Daniel B. O'Connell is a licensed well driller, qualified  
7 pursuant to the state's examination system. He is an employee of MVM  
8 Quality Drilling, located in Bridgeport, Washington.

9                               II

10          The Department of Ecology is a state agency which administers the  
11 allocation of groundwater resources and conducts a program regulating  
12 the construction of water wells.

13                              III

14          Under RCW 90.44.030, a permit is required for the appropriation  
15 of groundwater with the exception of relatively small developments  
16 usually involving domestic wells. For groundwater developments  
17 subject to permit, the well construction regulations require that a  
18 permit be received before the well is drilled. WAC 173-160-040.

19                              IV

20          On September 21, 1988, O'Connell submitted to Ecology a well log  
21 for an irrigation well constructed in August 1988 on property near the  
22 Conconully Highway in Okanogan County. On March 20, 1989, O'Connell  
23 submitted two well logs for two wells completed in early 1989 for WN  
24



1 Orchards of Pateros, Washington. The proposed use of one of these was  
2 noted as irrigation; the proposed use of the other was not identified.

3 V

4 On checking their files, Ecology personnel could find no record  
5 of an appropriation permit for any of the three wells identified in  
6 the well logs submitted by O'Connell. No such permit had in fact been  
7 obtained prior to the drilling of the three wells in question.

8 VI

9 On May 5, 1989, Ecology sent separate Notices of Civil Penalty  
10 for constructing the wells "without benefit of a permit," to both MVM  
11 Quality Drilling and to O'Connell. The Notice directed to O'Connell  
12 assessed a penalty of \$50 per well for a total of \$150.

13 MVM did not appeal the penalty assessed against it. However,  
14 O'Connell brought this appeal of the separate penalty assessed against  
15 him personally, after Ecology declined to grant his request for  
16 mitigation.

17 VII

18 The groundwater permit program involves Ecology in often  
19 difficult judgments about the availability of water in particular  
20 locales, the extent of existing demands on the resource and the status  
21 of prior rights. Conclusions reached on these matters frequently  
22 leads to the conditioning of permits, as to precise location, depth or  
23 zone to be tapped, casing requirements to protect certain aquifers,  
24 and other requirements specific to individual wells.

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(3)

1       The requirement that a permit be issued before a well is drilled  
2 is to allow for compliance with such conditions in the well  
3 construction process.

#### 4                               VIII

5       With the increased usage of groundwater in recent years, the  
6 program for regulating well constuction has grown more thorough and  
7 more detailed. Presently, the system calls for a "start card" to be  
8 filed with the agency at least three days before the start of  
9 drilling, stating the location of the job and its duration. The  
10 purpose is to give Ecology personnel a chance to check the file in  
11 advance to see if required permits have been issued. If a needed  
12 permit has not been issued, Ecology contacts the contractor and  
13 attempts to prevent a problem from arising.

14       In none of the cases at hand was a "start card" received by  
15 Ecology. In each case, the agency became aware of the well  
16 construction after the fact through the submission of well logs.

#### 17                               IX

18       The construction of a water well frequently involves at least  
19 three parties: the appropriator, the water well contractor and the  
20 driller or operator.

21       The permit is, generally, applied for and obtained by the person  
22 wishing to appropriate the water, usually the landowner.

23       Commonly, the appropriator contracts with a contractor to  
24  
25

1 construct the well. In the ordinary case the contractor will own the  
2 drilling equipment to be used.

3 After the contract is made, the contractor normally assigns a  
4 driller in his employ to go to the site and do the actual construction  
5 work.

6 X

7 The common practice in the industry is for the contractor to  
8 handle negotiations with the appropriator and to do the preliminary  
9 paper work. The contractor is in a position to find out if a permit  
10 has been issued. The contractor schedules the work to be done and  
11 sends in the "start cards."

12 The driller is assigned to a job by the contractor, told what  
13 equipment to use, and sent out with a description of the location and  
14 the physical particulars about the well to be drilled. Most often,  
15 the driller will not know whether a permit has been issued or, even,  
16 whether "start cards" have been submitted.

17 XI

18 In the present case, O'Connell, the driller, had no advance  
19 information on the permit status of any of the projects, nor did he  
20 know that "start cards" had not been sent.

21 He supervised the construction of the three wells on site and  
22 noted and recorded the geologic details encountered in drilling, as  
23 well as the size, depth and other features of the wells when built.

24 This information, derived from experience on site, was  
25

1 subsequently transferred by O'Connell to a well log for each well.  
2 The balance of each log form, including the landowner's name and the  
3 legal description of the well location, was filled in by MVM Quality  
4 Drilling.

5 XI

6 At the hearing, Ecology expressed no dissatisfaction with the  
7 construction work on the three wells. The sole basis for the civil  
8 penalty assessed was the lack of an appropriation permit in each case.

9 The well not identified as to proposed use on its well log was  
10 later the subject of an application for domestic use. Ecology did not  
11 show that this well involved an appropriation exceeding 5,000 gallons  
12 a day.

13 XII

14 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
15 adopted as such.

16 From these Findings of Fact, the Board reaches the following:

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over these parties and the subject  
20 matter. Chapters 90.44, 18.104 and 43.21B RCW.

21 II

22 RCW 90.44.050 states:

23 After June 6, 1945, no withdrawal of public ground  
24 waters of the state shall be begun, nor shall any well

25  
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or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided. . . . (emphasis added.)

The language from the Groundwater Code is followed by a proviso which creates an exception to the permit requirement for withdrawals

for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day. . . .

## III

Chapter 18.104 RCW governs the regulation of water well construction. The statute establishes an examination and licensing requirement for well construction operators. RCW 18.104.070.

It also empowers Ecology to adopt rules governing how wells are made. RCW 18.104.040(4). Such rules are contained in Chapter 173-160 WAC, which includes a section stating that no well requiring an appropriation permit shall be constructed unless a permit has been granted. WAC 173-160-040.

The effect of this rule is to make the Groundwater Code's stricture against well construction prior to permit subject to the sanctions provided by chapter 18.104 RCW.

## IV

RCW 18.104.155 authorizes civil penalties "of up to one hundred

1 dollars per day per violation of this chapter or rules or orders of  
2 the department adopted or issued pursuant to it."

3 The Notice of Penalty (No. DE 89-C168) sent to O'Connell asserts  
4 the violation of a rule, WAC 173-160-040. From statutory context, it  
5 appears that civil penalties can be levied against both contractors  
6 and operators.

7 v

8 The question, then, is whether the particular rule cited, WAC  
9 173-160-040, applies to operators as well as to contractors. The  
10 terms are defined. RCW 18.104.020(5) and (7) and WAC 173-160-030(31)  
11 and (48). The term "driller" is used synonymously with "operator."  
12 WAC 173-160-030(49).

13 The focus of the definitions is that an "operator" is a  
14 contractor's employee who supervises actual well construction on site,  
15 whereas a "contractor" is the entity which conducts the business.  
16 Both the statute and the regulations explicitly impose certain record  
17 keeping and reporting requirements on contractors. RCW 18.104.048,  
18 WAC 173-160-055 (start cards); RCW 18.104.050, WAC 173-160-050 (well  
19 logs).

20 No such obligations for paper work are explicitly imposed on  
21 drillers. On the other hand, drillers are clearly intended to be held  
22 responsible (along with the contractors) for violations of the  
23 detailed and elaborate rules for the physical construction work.

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VI

We believe that the statute and its implementing rules were written in light of an understanding of the common practice in the industry. After considering, the overall scheme of the water well construction statute and the relevant rules, we interpret the provisions of WAC 173-160-040 as enforceable against contractors, but not against drillers.<sup>1/</sup>

In short, the responsibility for seeing that no well requiring a permit is constructed until that permit is granted falls on those in a position to know whether the requirement has been fulfilled and able to insist on its fulfillment as a contract condition. Successful implementation is a matter of office work, not field work.

VII

Our decision on this matter is based on our view of the law. We also note that the equities of the situation point in the same direction. The only way drillers can protect themselves against violating WAC 173-160-040 is by refusing to go out on any job until shown a permit. Realistically, this is asking employees to risk their livelihood for something clearly within the responsibility of their employers. It is rather like making drillers responsible for the failure to file "start cards."

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<sup>1/</sup> We recognize that in some small outfits, contractor and operator may mean the same person. In such cases that person is subject to all rules applicable to either contractors or drillers.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the following is entered:

FINAL FINDINGS OF FACT,  
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(10)



ORDER

The Notice of Penalty Incurred and Due (No. DE 89-C168) issued to Daniel B. O'Connell is reversed and the penalty assessed thereby is VACATED.

DONE this 20<sup>th</sup> day of March, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Chair

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Member